IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION II

State of Washington, Respondent, v. RODNEY STEVEN MITUNIEWICZ, AKA RODNEY STEVEN LENENBERGER, AKA RODNEY STEVEN WEBB, Appellant.	No. 33869-6-II UNPUBLISHED OPINION

Hunt, J. – Rodney Mituniewicz appeals his guilty-plea conviction of second degree possession of stolen property. He argues that his guilty plea was involuntary because it lacked a factual basis. He also argues pro se that the trial should have granted his request for the Drug Offender Sentencing Alternative (DOSA), RCW 9.94A.660. We affirm.

Facts

On July 29, 2005, Clark County charged Mituniewicz with first degree possession of stolen property based on his possession of a stolen car. He subsequently pleaded guilty to an amended information charging second degree possession of stolen property. The State refused to recommend a DOSA sentence and agreed instead to recommend a midrange sentence of 25 months confinement.

In his statement on plea of guilty, Mituniewicz acknowledged that (1) he was pleading guilty to second degree possession of stolen property as charged in the amended information, which was attached to his statement on plea of guilty; and (2) he had received a copy of that document. The amended information described the charge as follows:

> That he, RODNEY STEVEN MITUNIEWICZ . . . on or about July 28, 2005 did knowingly receive, retain, possess, conceal, or dispose of stolen property, to-wit: a stolen motor vehicle . . . belonging to Ann Marie Hutchinson, knowing that it had been stolen, and did withhold or appropriate the same to the use of a person other than the true owner or person entitled thereto; contrary to Revised Code of Washington 9A.56.160(1)(d) and 9A.56.140(1).

Clerk's Papers (CP) at 3. In his written guilty-plea statement, Mituniewicz described his offense in the following manner:

> In Clark County, WA, on or about July 28, 2005, I did knowingly possess stolen property, to wit: a 2003 Honda Accord, WA license plate # 652RDR, of a value in excess of $250 but less than $1500, knowing it had been stolen, belonging to Ann Marie Hutchinson.

CP at 11.

During the plea hearing, Mituniewicz stated that he was guilty of the amended charge of second degree possession of stolen property. He admitted that he had possessed the car in question, that it was worth between $250 and $1,500, and that he knew it had been stolen. He later reaffirmed that he had violated the law by being in a stolen car. He made no objection that his guilty plea lacked an adequate factual basis. The trial court found a factual basis for Mituniewicz's guilty plea; concluded that it was entered knowingly, voluntarily, and intelligently; and accepted his plea.

Mituniewicz then read a lengthy statement to the court in which he requested a DOSA sentence. Defense counsel noted that Mituniewicz had already been serving a DOSA sentence for

a prior offense that was revoked after he committed his current offense. The trial court (1) noted that one consideration in offering a DOSA sentence was the benefit to the community that would result therefrom, and (2) told Mituniewicz that he would not receive a second DOSA sentence after committing a crime during the first one. The trial court imposed the recommended sentence of 25 months.

Mituniewicz appeals.

ANALYSIS

I. Factual Basis for Guilty Plea

Mituniewicz argues that the trial court erred in finding a sufficient factual basis for his guilty plea because, during the plea hearing, there was no reference about whether he had withheld or appropriated the stolen car for the use of someone other than its owner. This argument fails.

Mituniewicz bases his argument on the statutory definition that "possessing stolen property" means "knowingly to receive, retain, possess, conceal, or dispose of stolen property knowing that it has been stolen and to withhold or appropriate the same to the use of any person other than the true owner or person entitled thereto." RCW 9A.56.140(1). The amended information included this statutory definition. But there was no express mention of the "withhold or appropriate" clause during the plea hearing. CP at 3.

At the outset, we note that Mituniewicz did not object below that his guilty plea lacked an adequate factual basis. Thus, unless this issue involves a "manifest error affecting a constitutional right," he may not raise it for the first time on appeal. RAP 2.5(a)(3). An adequate factual basis is not constitutionally required for a guilty plea. *In re Pers. Restraint of Hilyard*, 39 Wn. App.

723, 727, 695 P.2d 596 (1985). Although CrR 4.2(d) requires the judge taking a guilty plea to be satisfied that there is a factual basis for the plea, this rule "is not the embodiment of a constitutionally valid plea; strict adherence to the rule is 'not a constitutionally mandated procedure.'" *Hilyard*, 39 Wn. App. at 727 (quoting *In re Pers. Restraint of Vensel*, 88 Wn.2d 552, 554, 564 P.2d 326 (1977)).

Consistent with this rule of law, Mituniewicz acknowledges that a violation of the CrR 4.2 factual basis requirement is not constitutional in nature. Nonetheless, he contends that the alleged error rendered his plea involuntary in violation of his right to due process under the state and federal constitutions. Wash. Const. art. I, § 3; U.S. Const. amend. XIV, § 1. Because there is authority to the effect that a failure to adhere to the CrR 4.2(d) requirements may trigger an inquiry into whether a plea was voluntary, we examine whether Mituniewicz has succeeded in showing that manifest error occurred when the trial court accepted his guilty plea. *See State v. Branch*, 129 Wn.2d 635, 642, 919 P.2d 1228 (1996) (stating that even though failure to adhere to CrR 4.2 does not in itself result in a constitutional violation, the rule requires the record to show that the plea was entered voluntarily and intelligently). In this setting, "manifest" error requires a showing of actual prejudice; the record must indicate that the alleged error actually affected the defendant's constitutional rights. *State v. Walsh*, 143 Wn.2d 1, 8, 17 P.3d 591 (2001); *State v. McFarland*, 127 Wn.2d 322, 333, 899 P.2d 1251 (1995). Mituniewicz fails to make the required showing. Where the defendant actually possesses an understanding of the law in relation to the facts such that he could make an informed decision regarding whether to plead guilty, his plea is voluntary and there is no constitutional violation. *In re Pers. Restraint of Keene*, 95 Wn.2d 203, 209, 622 P.2d 360 (1980). A signed plea form provides "prima facie verification of the plea's

voluntariness." *State v. Perez*, 33 Wn. App. 258, 261, 654 P.2d 708 (1982).

Mituniewicz signed the plea form stating that he had received a copy of the amended information and its complete description of the offense charged. Moreover, Mituniewicz's attorney stated on the record that he and his client had spoken "quite a bit" about the plea agreement. Report of Proceedings at 6. Because there is a strong presumption that counsel's representation was effective, we presume that Mituniewicz's attorney advised his client about whether his conduct fell within the amended charge. *See State v. Thomas*, 109 Wn.2d 222, 226, 743 P.2d 816 (1987) (courts presume counsel's performance was reasonable); *State v. White*, 5 Wn. App. 615, 618, 489 P.2d 934 (1971) (court inferred counsel advised defendant appropriately during lengthy discussions of case).

We also presume that Mituniewicz's 1993 conviction of second degree possession of stolen property gave him some notice of the conduct that satisfies the offense charged here. And we agree with the State that, by knowingly possessing a stolen car, Mituniewicz realized that he was appropriating the car for the use of someone other than its owner. *See State v. Plank*, 46 Wn. App. 728, 731, 731 P.2d 1170 (1987) (to convict a defendant of second degree possession of stolen property, the State must prove that he possessed the property, that the property was stolen, and that the defendant knew the property was stolen).

Mituniewicz bears the burden of rebutting these presumptions and of showing that a manifest injustice occurred because he did not have an adequate understanding of the material facts in relation to the amended charge. He has not met that burden, and we will not consider this issue further.

II. DOSA

Mituniewicz raises two issues in a pro se statement of additional grounds for review. RAP 10.10.

In the first, he appears to argue that a RCW 9.94A.660 provision, rendering an offender ineligible for the DOSA option if he received a DOSA sentence more than once in the previous 10 years, amounts to cruel and unusual punishment. *See* RCW 9.94A.660(1)(f). This provision did not take effect until October 1, 2005, after Mituniewicz committed his current offense. Laws of 2005, ch. 460, §§ 1, 3. The trial court did not refer to the amendment in question, and it is irrelevant here. *See* RCW 9.94A.345 (sentences are determined in accordance with the law in effect when the current offense was committed). Thus, Mituniewicz's first pro se argument fails.

Second, Mituniewicz appears to complain about the sentence he received following revocation of his DOSA sentence for a prior offense. He adds that refusal to give a DOSA to a defendant with a drug problem is another example of cruel and unusual punishment. The sentence Mituniewicz received for his prior offense, regardless of whether it involved revocation of a prior DOSA, is not properly part of the appeal in the case before us. And with respect to his sentence for the current offense, Mituniewicz does show that the trial court abused its discretion in refusing his request for a DOSA. Thus, we do not consider this issue further. *See State v. Barton*, 121 Wn. App. 792, 797, 90 P.3d 1138 (2004) (RCW 9.94A.660 grants discretion to sentencing court to sentence offenders using the DOSA option).

Affirmed.

A majority of the panel having determined that this opinion will not be printed in the Washington Appellate Reports, but will be filed for public record pursuant to RCW 2.06.040, it is so ordered.

Hunt, J.

We concur:

Bridgewater, P.J.

Armstrong, J.